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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Columbus Southern Power Company for ) Case No. 08-917-EL-SSO  
Approval of its Electric Security Plan; an )  
Amendment to its Corporate Separation )  
Plan; and the Sale or Transfer of Certain )  
Generation Assets. )

In the Matter of the Application of Ohio )  
Power Company for Approval of its ) Case No. 08-918-EL-SSO  
Electric Security Plan; and an Amendment )  
to its Corporate Separation Plan. )

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**MOTION FOR A REFUND TO AEP'S CUSTOMERS  
AND MOTION FOR AEP TO CEASE AND DESIST  
FUTURE COLLECTIONS FROM CUSTOMERS**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO  
HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION,  
THE KROGER CO., AND THE OHIO ENERGY GROUP**

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The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Hospital Association ("OHA"), the Ohio Manufacturers' Association ("OMA"), The Kroger Co., and the Ohio Energy Group ("OEG", collectively with the foregoing parties, "Movants") hereby submit the above-captioned motions ("Motions")<sup>1</sup> to the Public Utilities Commission of Ohio ("PUCO" or "Commission"). Movants respectfully request the PUCO to order Columbus Southern Power Company ("CSP") and Ohio Power Company ("OPC") (collectively, "AEP" or "Companies") to refund monies collected over the past

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<sup>1</sup> The Motions are filed pursuant to Ohio Adm. Code 4901-1-12.

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several months for the 2009 electricity discounts to Ormet under a “temporary” unique arrangement.<sup>2</sup>

These collections are unlawful for a number of reasons. First, this rate collection was not authorized by the Commission in the Opinion and Order issued on March 18, 2009 (“ESP Order”). There was no finding that the Ormet temporary arrangement was reasonable and in the public interest. Second, the collection of the delta revenues from customers violates the tariff structure approved in the ESP Order that requires any delta revenues to be collected through an economic development rider, not through base rates. Because the Companies were not authorized in the ESP Order to collect these delta revenues and the delta revenues are being collected through unlawful means, the collections from customers are unlawful according to Sections 4905.22, 4905.32, and 4905.54 of the Revised Code.

Movants seek an order giving customers a refund of these unlawful collections. Movants request that the delta revenues already collected be refunded to customers because the collections were unauthorized *ab initio* and were inconsistent with the economic development rider that was set at zero, indicating no charges were being collected for any delta revenues. The Commission may require refunds of unauthorized collections, consistent with its authority in Sections 4905.04, 4905.06, and 4905.54 of the Revised Code. Additionally Movants request that the Commission issue a cease and desist order to the Companies to block any future collections of Ormet delta revenues

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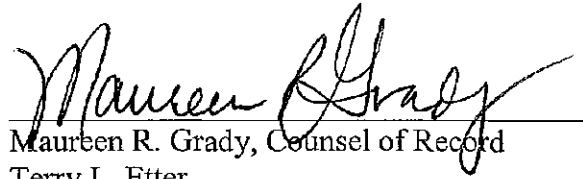
<sup>2</sup> *In re Ormet Temporary Special Arrangement*, Case Nos. 08-1338-EL-AAM et al., Finding and Order (January 7, 2009). These discounts for electricity create what is known as “delta revenues.” Delta revenues generally reflect the difference between the revenues that the Companies would otherwise have received from the customer under tariff and what the customer actually pays.

from customers. The Commission has the authority to issue such an order when utilities are not complying with PUCO orders.

The reasons for these Motions are explained in the attached Memorandum in Support.

Respectfully Submitted,

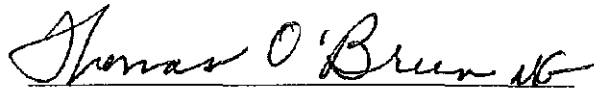
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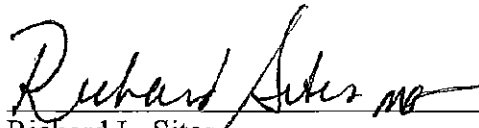
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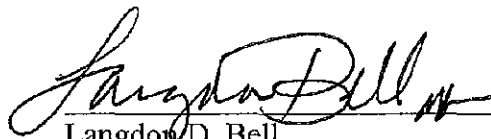


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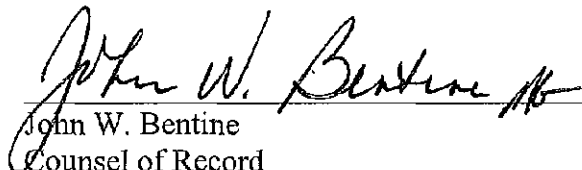
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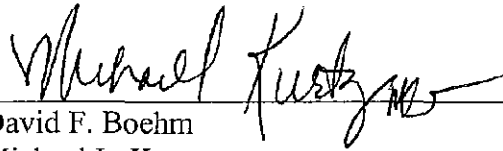
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**MEMORANDUM IN SUPPORT**

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**I. HISTORY**

On December 29, 2008, AEP and Ormet filed a joint application for approval of a “temporary” amendment to their special arrangement and for authority to modify AEP’s accounting procedures.<sup>3</sup> The application was made on the eve of the December 31, 2008 expiration of the previous special arrangement between Ormet and AEP, and while negotiations for a longer-term arrangement were underway. The application sought approval for a temporary arrangement where Ormet would pay the tariff rates (that predate the electric security plan) for generation, transmission, and distribution of \$38.43 per megawatt-hour. This rate compares quite favorably, from Ormet’s perspective, to the \$50 per megawatt-hour rate (\$43 generation rate, plus transmission and distribution charges) previously paid by Ormet under the expiring special arrangement. Accounting

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<sup>3</sup> *In re Ormet Temporary Special Arrangement*, Case Nos. 08-1338-EL-AAM et al., Application (December 29, 2009).

authority was also sought to permit AEP to potentially later collect additional amounts from customers by deferring the difference between the 2008 (administratively determined) market price for generation of \$53.03 per megawatt-hour and the Ormet temporary pre-ESP generation rate (\$30 per megawatt-hour). AEP also requested to collect the deferrals from customers in the ESP fuel adjustment clause mechanism or, if the fuel adjustment clause mechanism was not adopted, in standard service offer rates immediately upon approval of such new rates.<sup>4</sup>

Nine days later, on January 7, 2009, the Commission issued its Finding and Order regarding the Ormet temporary special arrangement (“Temporary Ormet Order”).<sup>5</sup> In the Temporary Ormet Order, the Commission approved the temporary special arrangement: “inasmuch as AEP Ohio’s ESP application is still pending before the Commission and there is a need to establish interim rates for Ormet pending current ongoing negotiations between the parties, the temporary arrangement proposed in the joint application and AEP Ohio’s request for deferrals is reasonable and should be approved.” Although the PUCO approved the request for accounting deferrals, it did not grant AEP’s request to collect the accounting deferrals, representing delta revenues from the temporary Ormet

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<sup>4</sup> Id. at 5-6.

<sup>5</sup> *In re Ormet Temporary Special Arrangement*, Case Nos. 08-1338-EL-AAM et al., Order (January 7, 2009) (“Temporary Ormet Order”). On February 6, 2009, OCC filed an application for Rehearing regarding the Temporary Ormet Order. Three months ago, on March 4, 2009, the Commission granted OCC’s application for rehearing to provide additional time to address OCC’s substantive arguments. Entry on Rehearing at 4 (March 4, 2009). To date, neither a rehearing has been held nor has an entry on rehearing addressing the merits of OCC’s claims been issued.



contract, at that time.<sup>6</sup> On February 2, 2009, Ormet filed a request for the Commission to approve a ten-year unique arrangement between it and AEP.<sup>7</sup> That case involves a proposal for a special arrangement that would take the place of the temporary rates approved in the Temporary Ormet Order.<sup>8</sup>

On March 18, 2009, the PUCO issued an Opinion and Order (“ESP Order”) approving and modifying the Companies’ electric security plans (“ESP”). The ESP Order addressed, in part, the Ormet special arrangement as well as the general issue of delta revenues related to special arrangements between the Companies and some of their industrial customers.

First, the Commission decided that AEP would not be permitted to pass onto customers, as part of fuel costs, the slice of system power costs that were intended to meet load responsibilities related to Ormet (and those related to MonPower).<sup>9</sup> The Commission said that it struggled, like the intervenors, to find a rational basis to approve such a proposal since AEP did not need to make market purchases to serve Ormet.<sup>10</sup> AEP’s plan was thus modified by the Commission to exclude the market purchase provision. Second, the Commission approved an unavoidable economic development

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<sup>6</sup> The “temporary” nature of the interim Ormet/AEP arrangement is currently being disputed. While Ormet and AEP contend that temporary arrangement continues until two conditions are met—the ESP order is issued and a subsequent new special arrangement is approved—OCC and OEG contend that this is not what the Commission ordered or intended. Motion to Enforce January 7, 2009 Order and to Cease Additional Deferrals and Request for Expedited Ruling by the Office of the Consumers’ Counsel and the Ohio Energy Group (May 11, 2009).

<sup>7</sup> *In re Ormet Special Arrangement*, Case No. 09-119-EL-AEC, Application (February 2, 2009).

<sup>8</sup> That proceeding has been continued and will be reconvened on June 11, 2009.

<sup>9</sup> *In re AEP Electric Security Plan*, PUCO Case Nos. 08-917-EL-SSO, et al. PUCO Case No. 08-918-EL-SSO, ESP Order at 15-16.

<sup>10</sup> *Id.*

rider to recover costs, incentives, and revenues foregone as a result of new or expanding special arrangements for economic development and job retention. Arguments concerning the initial and annual review of economic development contracts and the sharing of burdens related to delta revenues were noted but not adopted in the ESP Order.<sup>11</sup>

On March 23, 2009, AEP filed revised tariffs purportedly reflecting the rate increases authorized for the first year of the ESP plans, with rates being effective January 1, 2009, on a bills rendered basis. In the filed tariffs, the economic development rider was set at zero, with language stating that the rider “shall be adjusted periodically to recover amounts authorized by the Commission.”<sup>12</sup>

On March 30, 2009, the PUCO issued two Entries in the ESP case. One of the Entries summarily denied OCC’s Motion for Stay.<sup>13</sup> That Entry also approved the Companies’ March 23, 2009 tariffs, finding them to be reasonable and consistent with the PUCO’s ESP Order. The second Entry, an Entry Nunc Pro Tunc, directed the Companies to file a second set of revised tariffs, to be effective for bills rendered not earlier than both the April 1, 2009 billing cycle and the date upon which final tariffs were filed.<sup>14</sup> Additionally, the Commission ordered that the tariffs would be effective on and after the effective date and contingent upon final review by the Commission.<sup>15</sup> Just one half-hour after the Entry Nunc Pro Tunc, the Companies filed tariffs that were virtually identical to

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<sup>11</sup> Id.

<sup>12</sup> See Original Sheets 82-1D for both CSP and OP.

<sup>13</sup> *In re AEP Electric Security Plan*, PUCO Case No. 08-917-EL-SSO, et al., Case Nos. 08-918-EL-SSO, et al., Entry at 4 (March 30, 2009) (“Tariff Approval Order”).

<sup>14</sup> Id., Nunc Pro Tunc Entry (March 30, 2009).

<sup>15</sup> ESP Order at 72.

the tariffs filed on March 23, 2009. Again the economic development rider—the rider the Commission said would be used to collect Ormet-related delta revenues from customers—remained at zero for both companies. No further order was issued by the PUCO on the March 30, revised AEP tariffs.

Notably, the filed tariffs of March 23 and March 30 lacked any supporting records— records that would detail how the tariffs would comply with the ESP Order (proofs of revenue) and how they dealt with the subject of delta revenues connected with Ormet (including the collection of \$54 million). It now appears that, *despite the economic development rider being set to zero*, and the fact that the Commission never ruled that the Ormet temporary arrangement was reasonable and in the public interest, the AEP utilities are collecting Ormet delta revenues from customers.

Under the tariff filing of the companies, \$6 million per month in Ormet delta revenues is being collected in rates. Over the months of April and May, \$12 million in unlawful rates has already been collected from customers. If the PUCO takes no action, and permits the Companies to continue to unlawfully collect the Ormet delta revenues, \$54 million in total will be collected during 2009. The discount for the electricity is calculated on the basis of revenues that the Companies would otherwise have received from Ormet had Ormet been charged prevailing tariff rates for generation service.<sup>16</sup> These revenues are typically referred to as “delta revenues.” Mathematically, the \$54 million of delta revenues is the difference between the \$30 per megawatt-hour discounted

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<sup>16</sup> The Companies’ have argued that the delta revenues from the Ormet special arrangement should be measured at market, not tariffed, rates. *In re Ormet Temporary Special Arrangement*, Case Nos. 08-1338-EL-AAM, et al., Joint Application at 5 (December 29, 2008). OCC disputes this concept and applied for rehearing on this and other issues. *Id.*, OCC Application for Rehearing at 9-10 (February 6, 2009). OCC’s Application for Rehearing remains pending, following a Commission Entry on Rehearing issued to provide the PUCO more time to consider OCC’s arguments. *Id.* Entry on Rehearing at 4 (March 4, 2009).

generation rate that Ormet is paying and the \$43 per megawatt-hour generation rate in AEP's tariffs that Ormet otherwise should pay (were there not a discount) multiplied by the monthly Ormet usage.

This rate collection -- which has already begun under the guise of electric security plan ("ESP") rates -- is the entire discount for electricity the Companies agreed to provide to Ormet in 2009 under a "temporary" special arrangement. The collection of the Ormet delta revenue appears to be one of the primary reasons there is the now much-discussed large disparity between the revenues approved in the ESP Order and the rate increases imposed upon customers.<sup>17</sup>

## **II. ARGUMENT**

### **A. The Commission's ESP Order Did Not Authorize AEP To Collect From Customers \$6 Million Per Month In Ormet Delta Revenues In Base Rates.**

#### **1. The Commission did not rule upon whether delta revenues from the Ormet temporary arrangement should be collected in ESP rates from customers.**

The language of the ESP Order indicates that the Commission was not ruling upon any of the Companies' economic development arrangements, let alone the Ormet temporary arrangement. In particular, the Commission rejected OCC's arguments (that customers should not fund 100% of delta revenues) as "unnecessary at this stage." This ruling pointed OCC and other parties to a future "stage" or opportunity (e.g. on a case-by-case basis) to make such arguments.

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<sup>17</sup> The other reason for the discrepancy between the ESP Order and the rates charged relates to AEP collecting the rates retroactively.

Additionally, the Commission noted that it is vested with authority to review and determine whether or not economic development arrangements “are in the public interest,” further indicating that economic development arrangements must be found to be in the public interest before delta revenues can be collected. This public interest standard appears to be an interpretation of the “reasonableness” standard found in R.C. 4905.31, which allows the Commission to permit “reasonable” arrangements between utilities and their customers. Nonetheless, despite proclaiming a “public interest” standard for reviewing special arrangements, the Commission’s ESP Order conspicuously failed to apply that standard to the Ormet temporary arrangement.

Thus, beyond peradventure, the ESP Order did not determine the reasonableness of the Ormet unique arrangement, something the Commission was required to do before it permitted the Companies to collect increased rates from customers as a result of the arrangement. This requirement for a determination (on the reasonableness of the Ormet arrangement) is codified in R.C. 4903.09, wherein the General Assembly required that “the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” This statute has been violated. Without these requisite “findings of fact and written opinions” that the temporary Ormet arrangement is reasonable and in the public interest, it is patently unlawful that AEP has started to collect the Ormet delta revenues from customers. It is all the more egregious that these collections commenced unbeknownst to the Movants and other parties in this case.

**2. The economic development rider was the only approved mechanism to collect delta revenues. The Companies' collection of delta revenues through base rates is unlawful.**

Even assuming arguendo that the Commission had found the Ormet temporary arrangement to be in the public interest and reasonable, the Companies could only collect the delta revenues through the economic development rider mechanism that they proposed and the PUCO approved. Rather than following an open and public transparent regulatory process that is called for under the Ohio Revised Code<sup>18</sup>, the AEP utilities appear to have used a private post-Order process to their advantage to collect delta revenues through base rates, when such collection that was not provided for in the ESP Order. An AEP proposal to actually use the announced economic development rider to collect the delta revenues would have provided for regulatory transparency and otherwise would have avoided stealth collections of millions of dollars from customers. Whatever happened instead to allow collections was not transparent.

Several statutes under the Ohio Revised Code require AEP to collect increased rates only in accordance with the PUCO Order and in accordance with its approved rates and schedules. These statutes include R.C. 4909.17 and R.C. 4905.32, in addition to what already has been stated regarding R.C. 4903.09.

R.C. 4909.17 requires that no rate or charge shall become effective until the PUCO by order determines it to be just and reasonable. Here the PUCO never did

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<sup>18</sup> Under R.C. 4901.12, all proceedings of the PUCO and all documents and records in their possession are public records. All hearings shall be open to the public according to R.C. 4901.13. Additionally, R.C. 4905.07 requires that all facts and information in the possession of PUCO shall be public and all reports, records, files, books, accounts, papers, and memorandum shall be open to inspection. R.C. 121.22(A) also requires public officials, including the PUCO Commissioners, to take official action and to conduct all deliberations only in open meetings unless the subject matter is specifically excepted by law.

determine that \$6 million per month increase is just and reasonable in order to fund 100% of the Ormet discount.

Also, no utility shall charge any rate for any service rendered other than as specified in its schedule filed with the PUCO, under R.C. 4905.32. These statutes read together comprise the “filed rate doctrine” which assures predictability in rates and preserves the role of the PUCO in approving and setting rates. Here the PUCO’s ESP Order approved rates for the Companies when it modified the Companies’ ESP plan. But, the modifications did not include provisions under which Ormet delta revenues could be collected through base rates. The schedules approved by the PUCO, and on file at the PUCO, clearly provide for the collection of delta revenues, once approved on a case-by-case basis, to be collected through a specific economic development rider. By the provisions within the Companies’ own approved ESP plan, that rider is set at zero—not at a rate that would permit \$12 million in delta revenue to be collected.

**B. The Unauthorized Collection From Customers Of The Ormet Delta Revenues In The ESP Rates Violated Sections 4905.22, 4905.32, And 4905.54 Of The Ohio Revised Code.**

As explained in detail *supra*, the Companies’ collection of the delta revenues associated with Ormet, through the ESP base rates, was unauthorized by the Commission and inconsistent with the approved mechanism for collecting such revenues. This collection violates the ESP Order and the filed tariffs of the Companies, and consequently contravenes numerous provisions of the Revised Code including Sections 4905.22, 4905.32, and 4905.54 of the Revised Code.

Under the ESP Order issued in this case, the PUCO approved but modified the Companies’ ESP plan. The Companies then filed tariffs to implement the modified ESP plan. Those tariffs were reviewed by the PUCO, and the PUCO by order approved those

tariffs. The ESP tariffs and schedules are on file at the PUCO and set forth the terms of service under the ESP plan. The approved rates and schedules, though established through a new process envisioned by S.B. 221, end up being implemented in ways no different than any other proposed rates and schedules for utility service in Ohio, and hence, must adhere to the statutory principles underlying filed rates in Ohio.

In Ohio, filed rates may not exceed those that are established by law, according to R.C. 4905.22: “Every public utility shall furnish necessary and adequate service and facilities.... All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utility commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.” Here, the rate increase related to Ormet delta revenue was not determined to be just and reasonable by the Commission. Neither law nor order of the PUCO permitted these charges to be collected from customers for the Ormet discount. AEP, thus, is prohibited from collecting these charges because they are in excess of that allowed under the PUCO order.

AEP is prohibited, as well, under R.C. 4905.32, from exacting any charge for the Ormet delta revenues from customers because the rate schedules filed and approved by the PUCO under its March 30 Tariff Approval Order preclude such a collection. AEP’s tariffs only permit delta revenues to be collected from customers by way of a non-bypassable economic development rider. Because AEP unilaterally chose to set the rider at zero, and that rider was approved at zero, AEP cannot collect any amount for delta revenues other than zero unless it makes a subsequent filing.



AEP also cannot disregard the Commission's ESP Order, which precludes AEP from collecting from its customers the Ormet delta revenues at this time. R.C. 4905.54 requires every public utility to comply with every PUCO order, direction, or requirement when the Commission is acting under the authority of R.C. Title 49. Here, the PUCO was acting under its legitimate authority to approve, or modify and approve, the Companies' ESP plan, under R.C. 4928.143(C)(1). In doing so, the PUCO ruled that Ormet delta revenues should not be collected from customers at this time, and ordered future delta revenues to be collected through AEP's economic development rider. Yet, AEP has somehow managed to implement rates that are inconsistent with the PUCO's ESP Order.

These provisions of the Revised Code require the utility to adhere to rates prescribed and set by the PUCO, as contained in the approved tariffs and schedules. They continue to apply in the post-S.B.221 environment even though other provisions of the Code, in particular the formulaic rate setting provisions, do not. R.C. 4905.22 and 4905.32 are provisions of the Code that provide certainty and predictability in rates for customers. Customers can only be charged no more and no less than what the PUCO has approved, whether it be in the traditional rate setting process, or under the new S.B. 221 process. Once the PUCO approves charges, those charges are published in the form of schedules maintained publicly at the PUCO.

While S.B. 221 changed how some rates are set, it did not alter the fact that once rates are set, they may not be deviated from. Nor did S.B. 221 change the fact that utilities must file rate schedules to alert customers as to the prevailing rates they must pay. These provisions that must exist under a post-S.B.221 environment are provisions to

ensure that customers are charged no more and no less than the rates filed and approved by the Commission.

The requirement that PUCO approval is needed for tariffing of rates has given birth to the “filed rate doctrine” that has been applied in state case law, including in Ohio.<sup>19</sup> The purposes of the filed rate doctrine are to prevent discrimination by establishing one set published tariff that all customers are charged and to preserve the role of administrative agencies in approving rates.<sup>20</sup> Moreover, the filed rate doctrine assures predictability in the rates that will be charged and this purpose is accomplished by the guarantee that rate changes will only be made prospectively, not retroactively.<sup>21</sup>

The need to assure rate predictability is as great, if not greater, in the post-S.B. 221 environment as it was in the pre-existing environment. With the onset of competition and customer choice, the necessity of readily available, transparent, and verifiable information, in the form of filed rates and rate schedules, is crucial. From a competitor’s perspective, filed schedules and rates are essential to curbing the discrimination they may face. This is especially true in the nascent stage of electric competition.

Yet AEP’s actions here, in collecting rate increases for Ormet delta revenues through base rates, violated the Commission’s ESP Order and violated filed tariffs which establish a rider as the only means to collect such revenues. This is a violation that

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<sup>19</sup> See *H.J. Inc. v. Northwestern Bell Telephone Co.* (C.A.8, 1992), 954 F.2d 485, 494; *Taffet v. Southern Company* (C.A.11, 1992), 967 F.2d 1483, 1494.

<sup>20</sup> *MCI Telecommunications Corp. v. Ohio Bell Tel. Co.* (C.A. 6, 2004), 376 F.3d 539, 547-548, 2004 U.S. App. LEXIS 15266 (citing *Fax Telecommunications, Inc. v. AT&T*, (C.A. 2, 1998), 138 F.3d 479, 489.

<sup>21</sup> *Columbia Gas Transmission Corp. v. Federal Energy Comm.* (D.C.C.A.) (1990), 895 F.2d 791, 282 U.S. App. D.C. 386.

constitutes unlawful prohibited action under the Ohio Revised Code, even post S.B.221. The Commission should find AEP violated R.C. 4905.22, 4905.32, and 4905.54 by collecting increased rates from customers related to the Ormet delta revenues when it had no authority to do so.

**C. The Commission Should Order AEP To Refund To Customers Its Unauthorized Collections And Should Order AEP To Cease And Desist Collecting Any More Ormet Delta Revenues From Customers Via ESP Rates.**

**1. The PUCO has authority to order a refund of unauthorized rate increases.**

Under R.C. 4905.04, the PUCO has the power to supervise and regulate public utilities, including AEP. Additionally, under this provision of the Revised Code, the Commission may require all public utilities, including AEP, to furnish their products (electricity) and services (generation) as exacted by the Commission or by law. The PUCO also has general supervision over all utilities within its jurisdiction, including the extent to which the utilities are complying with laws and orders of the Commission, insofar as any such matters relate to costs associated with providing electric service, under R.C. 4905.06.

These provisions establish the general rules under which the Commission operates and provide sufficient authority to order a refund when the decision of the Commission is not being complied with and the utility is furnishing service according to terms that were not approved as just and reasonable by the Commission. Enabling a refund of monies collected through unauthorized charges to customers is consistent with carrying out these and other provisions of the Revised Code.

**2. *Keco* does not prohibit the PUCO from ordering a refund of these unauthorized rate increases.**

The Ohio Supreme Court precedent established in *Keco*<sup>22</sup> does not apply, under the factual circumstances of this case, to prevent the PUCO from ordering the refund of all delta revenues collected. In *Keco*, the Ohio Supreme Court was faced with a situation where the appellant attempted to obtain a ruling requiring a refund from the Supreme Court. There the PUCO had approved an application for increased rates, and the Court then found the Commission's order to be unreasonable, and remanded the case for further proceedings. The appellant sought a refund of the difference between the rates originally approved and the rates approved on remand. The Court held that where the rates were established by a properly designated authority after a hearing, in the absence of a stay, such rates are the only lawful rates that may be charged until such time as the rates were set aside by the Court.<sup>23</sup> Thus, Appellants in *Keco* did not have a right of restitution for the increase in charges collected during the pendency of the appeal.

Here, however, there was no Commission order approving the underlying action—the collection from customers of Ormet delta revenues through base rates. Thus, the rates were neither lawful nor approved by the PUCO. The proper rates established by the PUCO were the rates that reflected no recovery of Ormet delta revenues. AEP's tariff filings failed to establish rates consistent with the PUCO's findings in the ESP. *Keco* can have no applicability in the absence of a Commission order finding the collection of Ormet delta revenues from customers to be lawful and reasonable. The Commission should order a refund of prior collections.

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<sup>22</sup> *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 257 ("*Keco*").

<sup>23</sup> *Id.* at 258.

**3. The PUCO has authority to order AEP to cease and desist its collection of Ormet delta revenues from customers.**

The Commission has determined, and the Supreme Court of Ohio has affirmed, that it is appropriate for the PUCO to issue a cease and desist order under certain circumstances. Generally, the Commission has issued such an order where the utility is acting outside the statute. For instance, the Commission has found it appropriate to stop the actions of trucking companies operating inconsistently with their certificate of authority.<sup>24</sup> Here, AEP is acting outside numerous statutes by collecting unauthorized increases from customers regarding Ormet delta revenues. Those statutes include but are not limited to R.C. 4903.09, 4905.22, 4905.32, and 4905.54. A cease and desist order would therefore serve the purpose of stopping AEP's unlawful actions and protecting customers from further harm. The Commission should issue such an order to prevent the continuing harm that occurs as AEP collects \$6 million per month from customers with no authority from the PUCO.

**III. CONCLUSION**

AEP is collecting Ormet-related revenues from customers at a rate of \$6 million per month. But the Commission did not authorize the Companies to collect any delta revenues associated with the Ormet temporary arrangement. By the end of 2009, AEP plans to have collected a total of \$54 million from customers.

This unauthorized collection of increased rates from customers comes at a time when customers of AEP are struggling to survive. They along with certain parties and

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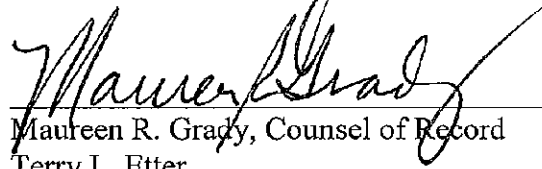
<sup>24</sup> See, e.g., *Commercial Motor Freight Inc. v. Public Util. Comm.* (1976), 46 Ohio St. 2d 195; *Holmes Cartage Co. v. Public Util. Comm.* (1976), 46 Ohio St.2d 267; *Duff Truck Line Inc. v. Public Util. Comm.* (1976), 46 Ohio St. 2d 186.

some policymakers are wondering why the capped rates the PUCO announced are being exceeded on customer bills. Customers have filed numerous letters in the docket voicing their concerns with the Commission ever since the ESP order was issued and have asked the Commission to respond to why there is an apparent and large discrepancy between rates “as advertised” and rates “as seen” on their bills. It is now clear to Movants that one of the primary reasons there is such a large discrepancy is that the rates are collecting \$6 million in additional revenues per month, in apparent disregard of the rate caps mandated in the PUCO ESP order.

The collection of Ormet delta revenues by the Companies, through their ESP base rates, is prohibited by the ESP Order and numerous Ohio statutes. Before such increases can be imposed upon customers, the Companies must prove the Ormet temporary arrangement is reasonable and in the public interest. That was not done in the ESP case, and consequently, the Companies were never authorized to collect such increases in ESP rates. Movants request that the PUCO right this wrong by ordering refunds to customers of all amounts of unauthorized rate increases associated with the Ormet delta revenues, and ordering AEP to cease and desist further collections.

Respectfully submitted,

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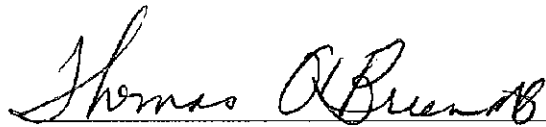
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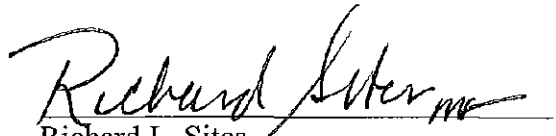
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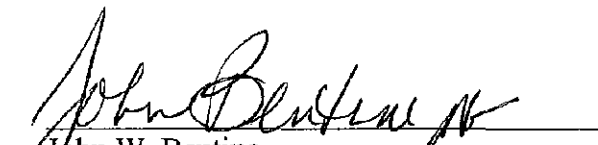
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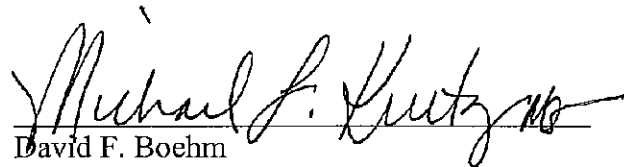
  
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A handwritten signature in black ink, appearing to read "Michael L. Kurtz", is written over a horizontal line.

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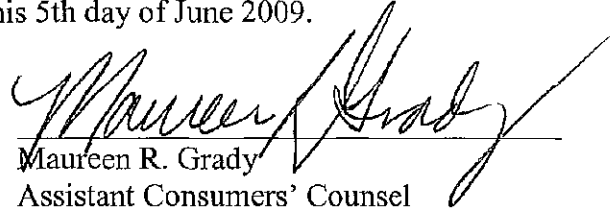
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motions was served by electronic service and by U.S. Mail, prepaid, to the counsel identified below (and provided electronically to the Attorney Examiners) this 5th day of June 2009.

  
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